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Private Law or Social Norms? The Use of Restrictive Covenants in Beaver Hills

ABSTRACT. This Note provides a detailed history of the use of restrictive covenants in Beaver Hills, a planned residential subdivision built in New Haven between 1908 and the end of the 1930s. It analyzes these covenants in light of both the relevant common law of servitudes and the contemporary evolution of public land use regulation, most notably zoning. These analyses reveal that restrictive covenants in this era are best understood as a form of signaling and social norms rather than as a form of private law.

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INTRODUCTION

An ornamental pier, stenciled with a fanciful rendering of a beaver gnawing a tree, stands on a street corner about a mile and a half northwest of downtown New Haven, Connecticut. In 1986, a purchaser of 389 Norton Street, the house located on that corner, received a deed stating that the Beaver Hills Company retained “the right [to enter the owner’s property] . . . to maintain the ornamental pier.”¹ The Beaver Hills Company (“the Company”) has not existed since 1938,² and the pier in question has not been subject to professional maintenance for some time. The deed restriction is irrelevant to the current owners of 389 Norton Street. But its existence and accidental survival are quite relevant to questions that still bedevil land use policymakers today.

New Haven’s Beaver Hills neighborhood sits at a fascinating crossroads in the history of residential urban development. The neighborhood was born out of farmland in 1908,³ in what was then the rural fringe of the city. New Haven’s Civic Improvement Commission had just entered its second year of existence, and Cass Gilbert and Frederick Law Olmsted, Jr., were applying the principles of the City Beautiful movement to a comprehensive plan for revamping New Haven’s built environment.⁴ Intellectual trends at the time strongly favored increased coordination and control in urban development. But the Gilbert-Olmsted proposal for a more systematically planned city was never realized, and New Haven’s first initiative toward concerted city planning, which spanned the first decade and a half of the twentieth century, has widely

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1. Deed of July 16, 1986 (recorded July 16, 1986), in 3494 New Haven Land Records 226, 226 (on file with the New Haven City Clerk’s Office) [hereinafter NHLR].
 2. New Haven Pres. Trust, Beaver Hills Historic District: Architecture, http://www.nhpt.org/History%20Pages/BH_ARCH.htm (last visited Mar. 7, 2007).
 3. The Company’s name first appeared in a 1909 New Haven city directory, see CITY OF NEW HAVEN, NEW HAVEN DIRECTORY (1909), and the New Haven Preservation Trust hypothesizes that the Company’s first advertising brochure was printed the previous year, see JENNIFER L. JULIER, THE SETON GUIDE TO BUSINESS AND INDUSTRIAL HOLDINGS IN THE WHITNEY LIBRARY 222 (2001). The Company also filed its Articles of Incorporation in Lewisboro, New York, in 1907. Westchester County Archives, Incorporation Records 1876-1914, <http://www.westchestergov.com/recordcenter/IncorporationCompanyNames.asp?pageNum=B> (last visited Mar. 7, 2007).
 4. See, e.g., Mark Fenster, Note, “A Remedy on Paper”: *The Role of Law in the Failure of City Planning in New Haven, 1907-1913*, 107 YALE L.J. 1093, 1102-03 (1998).

been deemed a failure.⁵ Indeed, a serious and effective increase in *public* urban planning would not occur in New Haven until decades later.⁶

Beaver Hills, though, tells a slightly different story about the fate of land use planning principles in the first few decades of the twentieth century. A residential area located northwest of downtown New Haven, Beaver Hills was the creation of a corporation called the Beaver Hills Company.⁷ In subdividing and developing the area between 1908 and 1938, the Company sought to achieve through private modes of regulation a kind of coordination and control analogous to that attempted through public means in the same period. According to scholarship on the history of New Haven, before the promulgation of New Haven's first zoning ordinance in 1926, "market forces and social custom" resulted in land use coordination at least as successful as that which would later be achieved by governmental regulation.⁸ Although this scholarship has largely neglected the role of restrictive covenants in land use coordination prior to World War II,⁹ restrictive covenants, including the deed restriction regarding the ornamental pier, were the most important tool that the Company used.

Restrictive covenants have played a crucial role in the history of twentieth-century American suburban residential development. The literature covering that history is rich and diverse,¹⁰ and the role played by the legal device of the

5. *Id.* at 1121; *see also* DOUGLAS W. RAE, *CITY: URBANISM AND ITS END* 83-84, 205-08 (2003) (describing the never-realized Gilbert-Olmsted plan).

6. *See* RAE, *supra* note 5, at 208, 261-62, 312-60; Fenster, *supra* note 4, at 1123.

7. The area developed by the Beaver Hills Company was bounded roughly by Goffe Street, Crescent Street, Dyer Street, and Ella T. Grasso Boulevard.

8. Andrew J. Cappel, Note, *A Walk Along Willow: Patterns of Land Use Coordination in Pre-Zoning New Haven (1870-1926)*, 101 *YALE L.J.* 617, 632 (1991); *cf.* SAM BASS WARNER, JR., *STREETCAR SUBURBS: THE PROCESS OF GROWTH IN BOSTON, 1870-1900*, at 117-52 (1978) (describing the architectural uniformity resulting from uncoordinated but similar behavior by small-scale builders). *But see* Stephen Clowney, Note, *A Walk Along Willard: A Revised Look at Land Use Coordination in Pre-Zoning New Haven*, 115 *YALE L.J.* 116 (2005) (arguing that Andrew Cappel's thesis about the effectiveness of private control should not be extended automatically to support appraisals of private control in the city as a whole).

9. One scholar claims that restrictive covenants were not widely used in New Haven prior to the 1940s. Cappel, *supra* note 8, at 630 n.84. The history of Beaver Hills casts doubt on that claim.

10. *See, e.g.*, HENRY C. BINFORD, *THE FIRST SUBURBS: RESIDENTIAL COMMUNITIES ON THE BOSTON PERIPHERY, 1815-1860* (1985); KENNETH T. JACKSON, *CRABGRASS FRONTIER* 244 (1985); *METROPOLIS ON THE MOVE: GEOGRAPHERS LOOK AT URBAN SPRAWL* (Jean Gottmann & Robert A. Harper eds., 1967); RAE, *supra* note 5, at 394-402; JOHN R. STILGOE, *BORDERLAND: ORIGINS OF THE AMERICAN SUBURB, 1820-1939* (1988); WARNER, *supra* note 8; ROBERT C. WOOD, *SUBURBIA: ITS PEOPLE AND THEIR POLITICS* 56-66 (1958); Leo F. Schnore,

restrictive covenant has not gone unnoticed.¹¹ Nonetheless, there has been little detailed discussion of the content, the legal context, and the potentially problematic nature of covenant schemes in the early decades of the twentieth century.¹²

This Note aims to provide such a detailed discussion and, in so doing, to contribute to the legal and policy debates over the interaction between public and private methods of land use coordination. Beaver Hills is a uniquely revealing object of analysis for this purpose. The development of the neighborhood began amid a dramatic upswing in public debate about the desirability of land use regulation. Zoning, arguably the most influential twentieth-century innovation in public land use regulation, entered New Haven in the 1920s,¹³ while the neighborhood's development was still in full swing. Meanwhile, the primary tool of land use regulation in Beaver Hills, the restrictive covenant, is virtually always mentioned in discussions of viable private alternatives to zoning and public regulation.¹⁴ Such studies often posit zoning and restrictive covenants as alternative and more or less interchangeable means of producing generally similar results.¹⁵ Restrictive covenants have even

Metropolitan Growth and Decentralization, in *THE SUBURBAN COMMUNITY* 3 (William M. Dobriner ed., 1958).

11. See STILGOE, *supra* note 10, at 223-24, 228-29 (describing, inter alia, the use of deed restrictions in the development of Forest Hills Gardens in Queens, New York); WARNER, *supra* note 8, at 122; MARC A. WEISS, *THE RISE OF THE COMMUNITY BUILDERS* 68-72 (1987).
12. A notable exception is Gerald Korngold, *The Emergence of Private Land Use Controls in Large-Scale Subdivisions: The Companion Story to Village of Euclid v. Ambler Realty Co.*, 51 CASE W. RES. L. REV. 617 (2001).
13. See RAE, *supra* note 5, at 261-62.
14. See, e.g., Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 713-15 (1973); Bernard H. Siegan, *Non-Zoning in Houston*, 13 J.L. & ECON. 71 (1970) [hereinafter Siegan, *Houston*]; Bernard H. Siegan, *Non-Zoning Is the Best Zoning*, 31 CAL. W. L. REV. 127, 139 (1994) [hereinafter Siegan, *Best Zoning*]; Cappel, *supra* note 8, at 619 n.12.
15. See Ellickson, *supra* note 14, at 682-83; Siegan, *Houston*, *supra* note 14, at 71-72, 77, 142; Donald W. Hansford, Comment, *Injunction Remedy for Breach of Restrictive Covenants: An Economic Analysis*, 45 MERCER L. REV. 543, 547 (1993) ("Where restrictions exist that incorporate use and aesthetic standards, the need for zoning is minimal." (quoting Stanley E. Harris, *Restrictive Covenants: A Need for Reappraisal of the Limitations Period*, 17 GA. ST. B.J., Feb. 1981, at 137, 137)); *id.* at 552 (noting that since 1935, Georgia has provided by statute that restrictive covenants shall not run for more than twenty years in municipalities with zoning laws in effect); Casey J. Little, Note and Comment, *Riss v. Angel: Washington Remodels the Framework for Interpreting Restrictive Covenants*, 73 WASH. L. REV. 433, 449 (1998). But see HELEN C. MONCHOW, *THE USE OF DEED RESTRICTIONS IN SUBDIVISION DEVELOPMENT* 6 (1928) (identifying the "basic difference between public and private control" as lying in the "relative intensity of their control"); WEISS, *supra* note 11, at 71 ("Members of the real estate business community understood that private restrictions were

been referred to as “a form of ‘private zoning.’”¹⁶ But concerted empirical study of the actual interaction between restrictive covenants and zoning ordinances has not been forthcoming. This Note provides such an empirical study and concludes that covenants and zoning should not be treated as interchangeable.

Part I provides a brief history of the Beaver Hills neighborhood and describes both the Company’s goals for the neighborhood and the strategies it used to achieve them. Part II describes the many obstacles, both external and self-created, to effectuating the Company’s goals through its chosen strategies. Part III, however, demonstrates that these goals in fact were achieved despite an inhospitable legal context and several seemingly illogical strategic choices. Part IV answers the vexing question of *why* this surprising outcome occurred, arguing that restrictive covenants were meant to serve more as embodiments of *social norms* and as *signals* than as literal, binding legal restrictions. Finally, the Conclusion synthesizes the lessons of Beaver Hills into general observations about how covenant schemes should be evaluated today.

I. THE HOUSE BEAUTIFUL: ASPIRATIONS FOR BEAVER HILLS

In 1906, a New Haven native named George Mead died and left his substantial landholdings to his grown children.¹⁷ The strategic value of land like Mead’s in a growing city would have been readily apparent. By 1908, the Mead heirs, led by the eldest son, D. Irving Mead, had incorporated the Beaver Hills Company¹⁸ and filed a map of their father’s lands—now subdivided into lots for residential development—with the New Haven Town Clerk’s Office.¹⁹ The first lot was sold by October of that same year.²⁰

As late as 1901, the area that would become Beaver Hills was still farmland, and it was so undeveloped that the Sanborn Insurance Company did not bother to include it on the insurance map of the city that it produced that

no panacea and could not substitute for public regulation.”); Siegan, *Houston*, *supra* note 14, at 142 (noting that covenant schemes created before 1950 may have been less effective regulation devices than zoning because many were poorly drafted or scheduled to expire).

16. Hansford, *supra* note 15, at 547 (quoting Harris, *supra* note 15, at 137).

17. See New Haven Pres. Trust, Beaver Hills Historic District: History http://www.nhpt.org/History%20Pages/BH_History.htm (last visited Mar. 7, 2007).

18. *Id.*; Westchester County Archives, *supra* note 3.

19. See Map of Building Lots Owned by the Beaver Hills Company (Mar. 1908), in 8 New Haven Land Records: Maps 50 (on file with the New Haven City Clerk’s Office) [hereinafter NHLR: Maps].

20. See Deed of Oct. 16, 1908 (recorded Oct. 17, 1908), in 623 NHLR, *supra* note 1, at 37.

year.²¹ But a 1911 city atlas shows that the basic street plan proposed by the Company in its 1908 subdivision map had been executed in those three years.²² By 1911, seventeen houses had already been built within the area of the original subdivision.²³

Figure 1.
MAP OF BEAVER HILLS IN 1911

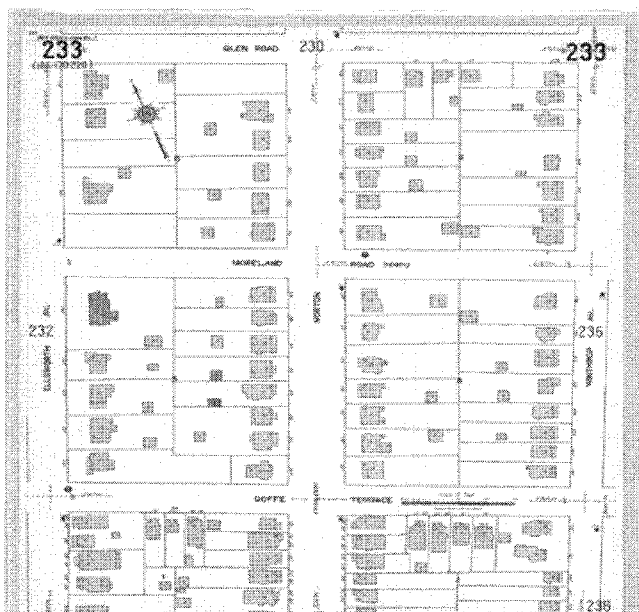


21. See 1 SANBORN MAP CO., INSURANCE MAPS OF NEW HAVEN, CONNECTICUT index (1901), available at http://images.library.yale.edu/newhavensids/1901/sb1901_vol1_indexmap.sid (requires ExpressView plugin).
22. By this date, Winthrop Avenue, Norton Street, and Ellsworth Avenue had all been extended north of Goffe Street, and the streets that would become Moreland and Glen Roads (and were known at the time as Henry and Munson Streets, respectively) had been laid out north of and parallel to Goffe. See STREULI & PUCKHAFFER ENG'RS, ATLAS OF NEW HAVEN, CONNECTICUT plate 6 (1911) [hereinafter ATLAS], available at http://images.library.yale.edu/newhavensids/1911/ANH_1911_006.sid (requires ExpressView plugin); *id.* plate 26, available at http://images.library.yale.edu/newhavensids/1911/ANH_1911_026.sid (requires ExpressView plugin). Plate 26 of the atlas is reproduced as Figure 1. The names of Henry and Munson Streets were changed sometime between the creation of this map in 1911 and the submission of a second subdivision map by the Beaver Hills Company in 1921. See Map of Building Lots Owned by the Beaver Hills Company No. 2 (May 1923), in 9 NHLR: Maps, *supra* note 19, at 122-23. This Note refers to the streets by their current names, Moreland and Glen.
23. See ATLAS, *supra* note 22, plate 26.

In 1924, sixteen years after the Company began selling lots, eighty-one structures had been built in the neighborhood.²⁴ In the second half of the 1920s, the Company moved its sales and development operations to the west, opening two new north-south streets, Colony Road and Bellevue Road, to the west of Ellsworth Avenue.²⁵ Sales in this area, and in the area north of Glen Road, then constituted the bulk of the Company's activity until it was dismantled in 1938.²⁶

Figure 2.

MAP OF BEAVER HILLS IN 1924



24. See 2 SANBORN MAP CO., INSURANCE MAPS OF NEW HAVEN, CONNECTICUT No. 233 (1924) [hereinafter 2 SANBORN 1924], available at http://images.library.yale.edu/newhavensids/1924/sb1924_233.sid (requires ExpressView plugin). This map is reproduced as Figure 2.
25. See Map of Building Lots Owned by the Beaver Hills Company No. 4 (Dec. 1925), in 10 NHLR: Maps, *supra* note 19, at 6-7.
26. New Haven Pres. Trust, *supra* note 2. The Company was reorganized in 1938 and was renamed the Mead Property Company. *Id.* The Mead Company engaged in scattered transactions in the neighborhood in the several years following the reorganization, see Grantor Index to Land Records for 1941 (on file with the New Haven City Clerk's Office); Grantor Index to Land Records for 1940 (on file with the New Haven City Clerk's Office); Grantor Index to Land Records for 1939 (on file with the New Haven City Clerk's Office), but by 1943 it had disappeared from the New Haven real estate scene, see Grantor Index to Land Records for 1943-1944 (on file with the New Haven City Clerk's Office).

The Company's activities and business model made it what Marc Weiss has called a "community builder," distinguished from a run-of-the-mill subdivision developer by its "longer time-frame for development, larger scale of activity, [and] greater degree and quality of design."²⁷ While the behavior of ordinary subdividers tended to earn them derogatory nicknames like "curbstoners" and "fly-by-nights," community builders "were much more likely to assume the broader and more generalized land-use perspective advocated by planners."²⁸ Like those who advocated city planning, community builders sought to use various methods of regulation to implement particular plans for the areas under their control.

The Company articulated its vision for the neighborhood in its sales brochure. The brochure appealed to readers whose experience of urban nuisance and disorder had instilled in them a desire for control and order. The Company promised to take the uncertainty out of home ownership, with such features as a "general plan" of development, a "uniform building line," and prohibitions on "eccentricities and undesirable cheapness of design."²⁹ The Company also sought to assure prospective buyers that it was cut from community builder, and not curbstoner, cloth: "It is believed the reader will appreciate that this plan is not a scheme of the land promoter. This property is being developed by the same interests which have held it the past fifty years."³⁰ The brochure linked the Company's mission—creating "not merely a successful real estate development but a charming community"—to its designation of a Craftsman bungalow that it had recently erected at the corner of Norton and Goffe Streets as "a place of meeting and a means of promoting the neighborhood spirit."³¹

Restrictive covenants were a primary instrument for realizing the vision of Beaver Hills from the very beginning. For example, in the summer of 1909,

27. WEISS, *supra* note 11, at 5.

28. *Id.* at 5, 51.

29. BEAVER HILLS CO., BEAVER HILLS 12 (1908) (on file with the New Haven Colony Historical Society).

30. *Id.* at 15.

31. *Id.* at 14. It is important to note, however, that the Company's plan for the neighborhood never involved a homeowners' association or the provision of common goods (outside of the clubhouse, to which the Company appears to have retained ownership rights). Later developers found homeowners' associations to be an extremely useful means of achieving the goals that the Company sought to achieve through restrictive covenants alone. See, e.g., EVAN MCKENZIE, *PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT* (1994); Robert C. Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519 (1982); Clayton P. Gillette, *Courts, Covenants, and Communities*, 61 U. CHI. L. REV. 1375 (1994).

when the Company sold a house lot to Frederick G. Murray, the deed contained the following language:

Said premises are conveyed subject to the following covenants and restrictions which shall run with the land until January 1st, 1935, viz:

Said Grantee, as part of the consideration of this deed, covenants with said Grantor, that no fence nor any part of a building (except steps, piazzas and bay windows) shall be erected within thirty feet of the street line in front of said premises or 15 feet of the street at the side of said premises, and that said premises shall be used for no other than residential purposes, except that a private stable or garage may be erected on said lot appurtenant to a dwelling provided that said stable or garage is not erected within one hundred feet of the street in front of said premises, or thirty feet of the street at the side of said premises.³²

Restrictions similar or identical to those in the "Murray Deed" would be inserted into virtually every subsequent deed of sale for lots originally owned by the Company. In addition, the Company imposed restrictions on the construction and design of houses in the neighborhood.³³ These restrictions were *not* contained in the deeds to the lots, and they required lot buyers to construct a house within a certain period of time after purchase and to obtain the Company's approval of the design.³⁴

The strategy chosen by the Company to regulate land use in the neighborhood is by no means unfamiliar to the modern reader. It has been estimated that nearly 15% of American housing units are part of a development regulated by covenants.³⁵ Nowadays the legitimacy and effectiveness of this practice are rarely questioned. In fact, it has been suggested that "[s]ystems of covenants are an ideal system of land use regulation in major developments undertaken by single owners."³⁶ The use of restrictive covenants was, of course, not unheard of in the Company's day either: "Regulating the use of land through private restrictive covenants is an old idea."³⁷ However, the

32. Deed of July 27, 1909 (recorded July 30, 1909), in 631 NHLR, *supra* note 1, at 440, 440 [hereinafter Murray Deed].

33. See BEAVER HILLS CO., *supra* note 29, at 12; New Haven Pres. Trust, *supra* note 17 (asserting that all house designs had to be approved by an architectural team, that houses had to be built within two years of the lot purchase, and that houses had to cost a minimum amount).

34. See discussion *infra* Section II.B.

35. Korngold, *supra* note 12, at 619.

36. Ellickson, *supra* note 14, at 717.

37. Allen Oshinski, *Restrictive Covenants and Architectural Review: Some Suggested Standards*, 27 J. MARSHALL L. REV. 939, 939 (1994).

practice of deploying covenants that run with the land to achieve value-creating coordination of land use within a defined neighborhood did not truly become common in the United States until the turn of the twentieth century.³⁸

Current scholarship tends to take for granted two assumptions about such systems of covenants. The first is that they are effective legal commitments—essentially a form of “private law,” analogous in their effects to public land use regulations such as zoning ordinances.³⁹ The second commonplace assumption is that systems of covenants, if deployed correctly, will *increase* the value of the land they affect.⁴⁰ The benefits that accrue to purchasers of restricted lots are conceptually very simple: the purchaser is buying the assurance that the restrictions placed on the use of her land will also apply to and be enforced against the land of her neighbors. The validity of this second assumption, of course, depends on that of the first.

Neither assumption was entirely valid when Beaver Hills was founded. In the early twentieth century, a host of unfavorable legal doctrines, along with a lack of sophistication on the part of those who drafted and signed covenants, meant that the enforceability of covenants could not be assured.⁴¹ This, in turn, weakened the lot purchaser’s valuable assurance that the benefits she granted her neighbors would also be available to her. A rather vicious cycle existed at the turn of the twentieth century, wherein many courts and market participants believed that restrictive covenants *lowered* the value of land and so were reluctant to enforce them.⁴² Of course, covenants *are* in fact very likely to be a drag on property values, as covenants are, on their face, a burden on the land they restrict, analogous to an easement. To avoid depressing the value of the land they affect, as easements do, restrictive covenants must provide some benefits as well—typically, a promise that one’s neighbors will abide by similar restrictions, which is only the case if the restrictions are mutually enforceable. This means that courts did not need to refuse to enforce covenants in order to ensure that they would not lower the value of land; making all covenants

38. See WARNER, *supra* note 8, at 122; WEISS, *supra* note 11, at 45.

39. See *supra* note 15 and accompanying text.

40. See, e.g., Lee Anne Fennell, *Contracting Communities*, 2004 U. ILL. L. REV. 829, 836-37; Hansford, *supra* note 15, at 547.

41. See Ellickson, *supra* note 14, at 715-16.

42. See RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 3.1 cmt. a (2000) (describing courts’ historical “concerns that, because of their longevity, servitudes would adversely affect the value of the burdened parcels and might affect the value of nearby land by limiting or distorting development of the burdened parcel”); see also Little, *supra* note 15, at 449 (noting that early-twentieth-century courts tended to treat restrictive covenants as “value-diminishing burden[s]”).

mutually enforceable could actually have accomplished the same result. Such reasoning would have been no comfort to the developers and early residents of Beaver Hills, who probably expected to face courts that were fairly uniformly hostile to covenants. In light of this situation, then, it is more than a bit surprising that Beaver Hills both made extensive use of covenants and used them quite successfully.

II. OBSTACLES TO THE REALIZATION OF THE BEAVER HILLS SCHEME

This Part describes in more detail the obstacles to the realization of the Beaver Hills scheme. Some of these obstacles, as indicated above, were extrinsic—created by hostile courts and other unfavorable legal doctrines. Others, however, were intrinsic—created by decisions made by the Company that weakened the legal force of its covenant scheme.

A. *Extrinsic Legal Obstacles*

American courts in the earliest decades of the twentieth century were generally hostile to restrictive covenants. According to some, this hostility was based on nothing more than the “empty mantra[s]” of traditional prejudice,⁴³ but legitimate policy concerns appear to have supported it as well. Restrictive covenants were seen both as a potential drag on the value of property to which they attached⁴⁴ and as an affront to the principles of free use and free alienability of private property.⁴⁵ This policy-based skepticism of covenants informed the interpretive rule of strict construction, by which covenants were generally given the narrowest reading that their language would support.⁴⁶

43. Korngold, *supra* note 12, at 628.

44. *See supra* note 42.

45. *See, e.g.,* Korngold, *supra* note 12, at 623.

46. *See, e.g.,* Ellickson, *supra* note 14, at 715-16; *see also* Hansford, *supra* note 15, at 546-47. Only four years after the Beaver Hills Company sold its first lots, the Connecticut Supreme Court applied that rule in a landmark decision against a group of New Haven homeowners who sought to enforce an eighty-year-old deed restriction barring the operation of offensive businesses on neighboring property. The court declared that

if the language of a restrictive covenant . . . remains of doubtful meaning, it will be construed against rather than in favor of the covenant. . . . Such covenants being in derogation of the common-law right to use land for all lawful purposes that go with title and possession, they are not to be extended by implication.

Easterbrook v. Hebrew Ladies' Orphan Soc'y, 82 A. 561, 564 (Conn. 1912). The high court's statement, issued in what appears to have been its first consideration of this particular use of covenants, was hardly encouraging.

In addition to hostile courts, venerable doctrinal requirements—such as the requirement of horizontal privity between covenanting parties,⁴⁷ the prohibition on the creation through covenants of benefits in gross,⁴⁸ and the distinction between real covenants and equitable servitudes⁴⁹—also reduced the ability of the Company and its clients to rely on their covenants. Most of these requirements have since fallen out of favor and have virtually no influence on the current law of covenants. But in the first half of the twentieth century these doctrines had two broader effects that would have been relevant to the buyers and sellers of Beaver Hills lots. First, they made courts reluctant to enforce affirmative covenants—that is, covenants requiring property owners to take, rather than refrain from, a certain action.⁵⁰ By 1908, when the Company drafted its first restrictive covenants, American courts had in some cases enforced affirmative covenants running with the land,⁵¹ and in subsequent decades prominent commentators would grumble about the irrationality of most courts' residual reluctance to do so.⁵² Nonetheless, the frequency with which this reluctance is mentioned in contemporary sources suggests that it was a genuine concern for drafters of affirmative covenants, such as those requiring a purchaser to erect a building on his land within a specified period of time.⁵³ As discussed below, this rather abstract distinction

47. See RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 2.4 & cmt. a.

48. See *id.* § 2.6 & cmt. a.

49. See *id.* § 1.4 & cmt. a. For background on this requirement as used in the early part of the century, see CHARLES E. CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH LAND" 170 (2d ed. 1947); and Paul McReynolds Jones, *Equitable Restrictions on the Use of Real Property and Their Relation to Covenants Running with the Land*, 13 CHI.-KENT L. REV. 33, 33-34 (1934).

50. This reluctance was related to the old distinction between real covenants and equitable servitudes. The requirement that real covenants "touch and concern" the land could invalidate agreements requiring, for example, a grantee to erect a wall on his land, because such an agreement concerned a hypothetical wall and not the land itself. See Jones, *supra* note 49, at 33-34. Affirmative equitable servitudes, however, were sometimes deemed unenforceable because of the traditional reluctance of courts of equity to order affirmative remedies. See Harlan F. Stone, *The Equitable Rights and Liabilities of Strangers to a Contract*, 18 COLUM. L. REV. 291, 303 (1918).

51. See, e.g., Jones, *supra* note 49, at 54-55 (citing *Maxon v. Lane*, 1 N.E. 796 (Ind. 1885); and *Lydick v. B. & O. R.R.*, 17 W. Va. 427 (1880)).

52. See, e.g., Stone, *supra* note 50, at 306.

53. It appears that no major Connecticut cases directly addressed this issue by the time the Beaver Hills Company began its operations. See W.E. Shipley, Annotation, *Affirmative Covenants as Running with the Land*, 68 A.L.R.2d 1022 (2005). Nonetheless, it can be presumed that Connecticut courts and market players would have taken for granted the common law skepticism toward affirmative covenants. Since then, this reluctance has largely disappeared. See *Neponsit Prop. Owners' Ass'n v. Emigrant Indus. Sav. Bank*, 15 N.E.2d 793

had important practical implications for the design of the Beaver Hills scheme.⁵⁴

Second, these older doctrines restricted the ability of certain affected parties to enforce covenants running with the land. Concepts of privity, derived from a period when most covenants both burdened and benefited the original parties, were ill equipped to cope with an era in which subdivider-grantors were imposing restrictions on grantees for the benefit of other grantees. At the turn of the century, this potential obstacle to suits by one lot purchaser against another was very much alive,⁵⁵ though it disappeared during the Company's operation.

One doctrine, newly emergent at the time, might have availed the Company in the face of the legal obstacles to covenant enforcement by one lot purchaser against another. I call this doctrine the "regular common plan doctrine."⁵⁶ A landmark 1892 New Jersey case summarized it as follows:

[W]here there is a general scheme or plan, adopted and made public by the owner of a tract . . . contemplating a restriction as to the uses to which buildings or lots may be put, to be secured by a covenant . . . ; and it appears, by writings or by the circumstances, that such covenants are intended for the benefit of all the lands . . . *and the covenants are actually inserted in all deeds for lots sold in pursuance of the plan*,—one purchaser and his assigns may enforce the covenant against any other purchaser and his assigns, if he has bought with knowledge of the scheme, and the covenant has been part of the subject-matter of his

(N.Y. 1938); RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES §§ 1.4 cmt. a, 3.1 cmt. a; ROBERT C. ELLICKSON & VICKI L. BEEN, LAND USE CONTROLS: CASES AND MATERIALS 568 (3d ed. 2005). *But see* Hansford, *supra* note 15, at 545 (implying that the distinction between real covenants and equitable servitudes is still relevant in some jurisdictions).

54. See *infra* Section II.B.

55. See RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 2.4 & cmt. a.

56. This phrase is used to distinguish the doctrine described here from the "*Sanborn* common plan doctrine" discussed *infra* notes 60-64 and accompanying text. The distinction between the two would have been relevant to purchasers of lots in a subdivision governed by a covenant design similar to that of the Company. Secondary sources, however, tend to use one term to refer to both—usually, the "general plan" doctrine. RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 2.14; ELLICKSON & BEEN, *supra* note 53, at 571-72. Some sources treat the *Sanborn* common plan doctrine as a particular application of the regular common plan doctrine. See RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 2.14 & cmt. b.

purchase. The right of action from this would seem to be dependent as much on the fact of the general scheme as on the covenant⁵⁷

In the 1920s, several Connecticut cases also established that the purchaser of a subdivision lot burdened by restrictive covenants would have standing to sue any party whose property had been part of the same subdivision, *as long as that party's property was similarly burdened*.⁵⁸

Even supposing that a Connecticut court would have applied this doctrine ten or fifteen years earlier, so that it could have provided assurance to the first Beaver Hills purchasers, an early purchaser of a Beaver Hills deed-restricted lot would still have had to worry about the possibility that the covenants she was agreeing to were *not* “actually inserted in all deeds for lots sold” in the surrounding subdivision.⁵⁹ Purchasers of Beaver Hills lots had to trust that the deeds of their neighbors contained restrictions similar to those in their own deeds. This gap in the regular common plan doctrine would have substantially reduced the reliability of the benefits conferred by deed restrictions.

This problem could have been solved by what I call the “*Sanborn* common plan doctrine,” which is attributable to *Sanborn v. McLean*, a 1925 Michigan case that popularized the concept of the “reciprocal negative easement.”⁶⁰ That concept addressed the situation in which an original owner of a subdivision had provided evidence of his intent to create a general scheme by inserting restrictions in many, but not *all*, of the deeds for lots sold. *Sanborn* held that, in this situation, owners of restricted lots would still be able to enforce the restrictions against the owners of unrestricted lots, as long as the defendants had “actual or constructive notice” of their existence.⁶¹

57. *De Gray v. Monmouth Beach Clubhouse Co.*, 24 A. 388, 392 (N.J. Ch. 1892) (emphasis added).

58. *See Town of Stamford v. Vuono*, 143 A. 245, 248 (Conn. 1928); *Armstrong v. Leverone*, 136 A. 71, 74 (Conn. 1927); *Gage v. Schavoir*, 124 A. 535, 538 (Conn. 1924); *Baker v. Lunde*, 114 A. 673, 676 (Conn. 1921).

59. It is now common practice for subdividers to provide purchasers with this assurance by drawing up a master deed, a recorded declaration of all restrictions operating in the community, and filing it with a land records office. This master deed would apply to all lots in the community and would thus have the same effect as inserting covenants into all the deeds. *See, e.g., ELLICKSON & BEEN, supra* note 53, at 569-71; *Fennell, supra* note 40, at 838. As is discussed *infra* Section II.B., the Beaver Hills Company did not elect to file such a declaration. Finally, one authority suggests that the filing of a declaration would not even have fulfilled the requirements of the regular common plan doctrine in the period under discussion. *See Jones, supra* note 49, at 46-47 (suggesting that only restrictions at least referenced in a deed will be enforceable in equity).

60. 206 N.W. 496, 497 (Mich. 1925).

61. *Id.* at 497-98.

The difference between the regular and *Sanborn* common plan doctrines is that the latter goes further in tying the benefits of a covenant to its burdens. The regular common plan doctrine requires that all lots in a subdivision be burdened by the same restrictions. Thus, if 90% of the lots in a subdivision were sold with identical restrictions in their deeds but the other 10% were sold without restrictions—say, to buyers who offered to pay a premium price—then the 90% governed by the restrictions could not demand that the remaining 10% abide by them. But under the *Sanborn* common plan doctrine, as long as the unrestricted 10% were aware of the existence of a common plan and its embodiment in the other deeds, the majority would have the right to demand the minority's compliance. In other words, under the *Sanborn* doctrine, the purchaser of a deed-restricted property in a certain kind of residential development almost always purchases the benefit of identical restrictions enforceable against her neighbors. The rule in *Sanborn* should therefore maximize the value of a restricted lot; no discounting of that value is necessary to account for the purchaser's uncertainty regarding the restrictions under which the surrounding land will be sold.

The benefits of this certainty do not, however, appear to have accrued to Beaver Hills purchasers. Despite its eventual influence nationwide, *Sanborn* appears never to have been cited in a published Connecticut case. And five years after the case was decided, the Connecticut Supreme Court refused to apply the *Sanborn* common plan doctrine in a similar case. Of the fifty-four lots in the subdivision at issue in *Whitton v. Clark*, twenty were burdened by covenants requiring the grantee to erect a house at a named minimum cost and not to use the land for nonresidential purposes.⁶² The owner of several of the unburdened lots sued for a declaration that his land was unfettered by easements attributable to owners of the restricted lots. The court granted this declaration because twenty restricted lots out of fifty-four—eight short of a majority—fell “far short of . . . any general plan or scheme,” despite the fact that the content of these restrictions might have signaled to purchasers that they were buying into a planned residential community.⁶³ In *Sanborn*, fifty-three out of ninety-one lots were restricted—seven lots greater than a majority.⁶⁴ The phrase “far short” in *Whitton* seems to indicate that the court did not intend a bare majority to serve as the crucial threshold, but instead began its analysis with a fundamentally different assumption from the *Sanborn*

62. 151 A. 305, 306 (Conn. 1930).

63. *Id.* at 308-09.

64. 206 N.W. at 497.

court: absent overwhelming evidence in its favor, a common plan does not exist.

In conclusion, the assumption on which the profitable use of restrictive covenants rests—that the covenants confer benefits sufficient to outweigh the burdens they impose—was quite a bit more speculative in the days of the Company's operation than it is today. Though Connecticut courts eventually endorsed the regular common plan doctrine, they did not do so until long after the first Beaver Hills lots were sold, and they never endorsed the *Sanborn* common plan doctrine. This legal climate severely limited the ability of Beaver Hills purchasers to rely on that assumption. In theory, this should have made prospective purchasers reluctant to purchase a deed-restricted lot.

B. Self-Created Obstacles: The Company's Failures

Given this context of legal uncertainty, one might wonder why a developer would bother with restrictive covenants at all. At the very least, one would expect that the Company would have done everything in its power to ensure the enforceability of its covenants, on the theory that this would assure potential buyers of the value of what they were purchasing. In fact, however, the Company's behavior confounds this expectation.

Four major flaws can be identified in the Company's execution of its covenant scheme. The first three can be discerned readily by reference both to the restrictions inserted in virtually every deed of sale for a Beaver Hills lot and to the subdivision maps filed by the Company. The fourth flaw becomes evident only after more careful investigation of the Company's documentary history.

The first flaw lies in the wording of the deed restrictions. The covenant in Frederick Murray's deed, for example, is typical of those inserted in the deeds to most other lots. The deed stated that the land could "be used for no other than residential purposes."⁶⁵ Readers familiar with the key land use debates of the early twentieth century will be quick to locate a potential weakness in this wording. The segregation of single-family from multifamily housing was a major effect of zoning ordinances created in subsequent decades, but this deed did not explicitly provide that only single-family residences were permitted. This provision was therefore open to misreading or abuse, particularly given

65. Murray Deed, *supra* note 32, at 440.

the potential profits to be made from developing multifamily housing in a residential area as desirable as Beaver Hills.⁶⁶

The second flaw lies in the form, and not the content, of the restrictive covenants—specifically, in the fact that the Company chose to place the restrictions in *individual deeds* rather than in a common declaration, which would have served the same function as restrictions inserted into every individual deed.⁶⁷ No declaration of restrictions can be found under the Company's name in the New Haven Land Records Office. Given that the *Sanborn* common plan doctrine was not created until well after the Company began selling lots, and given that it was never endorsed in Connecticut, Beaver Hills lot purchasers would have had no way of knowing whether neighboring lots would be burdened with restrictions identical to those burdening their own. It would have been very easy for the Company to turn this uncertainty into a source of profit by using variable restrictions as bargaining chips, offering lot purchasers fewer restrictions in exchange for a higher price. Such purchasers might have included individuals who hoped to operate commercial establishments on their property or who simply assumed that the resale value of their homes would be higher without the burden of covenants.

The third flaw in the Company's execution of its scheme lies in the way individual lots were mapped. Connecticut law now mandates the approval of subdivision plats by city planning commissions.⁶⁸ This approval requirement only dates back to 1947 and thus did not affect the Beaver Hills development.⁶⁹ However, the size and layout of lots on a subdivision map is a key part of the promise a subdivider makes to regulatory authorities and, presumably, to his purchasers. It is thus striking to observe how frequently the Company, in its early years of operation, conveyed only portions of the lots designated in its 1908 subdivision map.⁷⁰ The many purchases of lot portions that the Company

66. See MONCHOW, *supra* note 15, at 33 (identifying this pitfall and advocating more careful drafting).

67. See *supra* note 59.

68. See CONN. GEN. STAT. § 8-25 (2007).

69. See *id.*; 9 ROBERT A. FULLER, CONNECTICUT PRACTICE SERIES: LAND USE LAW AND PRACTICE § 10.9 (2d ed. 1999).

70. See Deed of July 31, 1922 (recorded Nov. 6, 1922), in 959 NHLR, *supra* note 1, at 261, 262 (conveying part of Lot 29c); Deed of Apr. 5, 1920 (recorded Apr. 24, 1920), in 880 NHLR, *supra* note 1, at 42, 43 (conveying parts of Lots 115 and 116); Deed of June 22, 1915 (recorded June 30, 1915), in 755 NHLR, *supra* note 1, at 148, 149 (conveying parts of Lots 16 and 17); Deed of Oct. 19, 1911 (recorded Oct. 21, 1911), in 676 NHLR, *supra* note 1, at 95, 95 (conveying parts of Lots 43 and 44); Deed of Sept. 25, 1911 (recorded Oct. 3, 1911), in 672 NHLR, *supra* note 1, at 485, 485 (conveying part of Lot 42); Deed of Sept. 21, 1911 (recorded Sept. 29, 1911), in 672 NHLR, *supra* note 1, at 421, 421 (conveying parts of Lots 79 and 80);

permitted could have led to the creation of building lots that were *smaller*, and thus held smaller houses, than was originally planned. Indeed, maps show that the Company's laxity in this area did result in a significant degree of nonconformity to the original map; however, the most striking instances of nonconformity were created by houses erected on lots that were *larger*, sometimes significantly so, than those envisioned by the Company in 1908.⁷¹ For example, on the east side of Ellsworth between Goffe and Moreland, the northernmost lot appears to be solely responsible for the reduction of the number of lots in that block from seven to five. It was purchased as two whole original lots and a portion of a third in 1915.⁷² The conveyance of a very large lot coupled with a deed stipulating that the lot was to be used only for "residential purposes" obviously left open the possibility that multifamily housing would be constructed on that lot.

The fourth major flaw in the Company's execution of its plan for the neighborhood was the result of yet another curious oversight. Both the Beaver Hills sales brochure and the extremely limited secondary literature on the neighborhood refer to restrictions on the design and construction of houses.⁷³ Yet the deeds contained no such restrictions. The only corroboration of the restrictions' existence comes from a series of documents on file with the New Haven Land Records Office. These documents confirm that the restrictions *did* exist but that they were not covenants running with the land; rather, they were personal contracts between the Company and initial lot purchasers.

The documents in question pertain to a piece of land that is now 516 Ellsworth Avenue. In April of 1920, portions of two lots in this area were sold by the Company to one Arthur C. Jewett.⁷⁴ Twenty-three months after his original purchase, Jewett resold the land to John J. and Anna H. McKeon.⁷⁵ Apparently, all was well for four years after the sale; then, in 1926, the McKeons entered into an "agreement" with the Company. The text and context of this agreement testify to its ambiguous legal status:

That under date of Mar. 30, 1920, said Company and said Arthur C. Jewett, entered into an agreement relating to the sale and transfer of a

Deed of Mar. 31, 1910 (recorded Apr. 5, 1910), in 645 NHLR, *supra* note 1, at 215, 215-16 (conveying part of Lot 60).

71. Compare ATLAS, *supra* note 22, plate 26, and Map of Building Lots Owned by the Beaver Hills Company, *supra* note 19, with 2 SANBORN 1924, *supra* note 24, No. 233.

72. See Deed of Oct. 27, 1915 (recorded Oct. 30, 1915), in 762 NHLR, *supra* note 1, at 476.

73. See sources cited *supra* note 33.

74. See Deed of Apr. 5, 1920, *supra* note 70.

75. See Deed of Mar. 7, 1922 (recorded Mar. 9, 1922), in 936 NHLR, *supra* note 1, at 439, 439.

certain piece or parcel of land As stipulated in the above mentioned agreement and as a part consideration for the transfer and sale of said land, [Jewett] agreed, by way of covenant, to erect upon said lot on or before March 1922, one detached one-family house according to plans and specifications prepared by R. W. Foote, Architect, or by any other architect when said plans and specifications are approved in writing [by the Company]. . . . Said house to cost not less than Seven Thousand (\$7000) Dollars. Now therefore as said covenant has not been complied with to date, [McKeon] agrees that in consideration of the [Company's forbearing] in any right or action which it might have under said covenant, he will or his grantee will on or before March 1928, fully comply with all provisions of said covenant. This agreement shall be binding upon and inure to the benefit of the Parties hereto and their heirs, executors, successors and assigns.⁷⁶

This agreement shows that the Company *did* require purchasers to erect architect-approved houses at a minimum cost within a specified period of time, but it chose to put these requirements into agreements separate from the actual title deeds to the lots. There seems to have been some confusion in the minds of the Company principals and their lawyers about whether these restrictions were covenants running with the land or personal contracts. The fact that the original agreement was not filed with the Land Records Office, coupled with the fact that the Company felt the need to draw up a new agreement in order to apply the restrictions to Jewett's successor in title, strongly indicates that a court would have treated the Jewett agreement as a personal contract.

However, certain factors indicate that the Company would have wanted the restrictions to run with the land. In its agreement with McKeon, the Company magnanimously pledged to forbear any cause of action against McKeon for not fulfilling the terms of Jewett's agreement, and it asserted that the terms of the McKeon agreement would be binding on McKeon's grantees. Finally, the Company did file *this* agreement with the Land Records Office, perhaps intending that it would then be treated as an encumbrance on the title to the land originally sold to Jewett. But wishful thinking by the Company aside, the most likely conclusion to be drawn from this document is that the Company used agreements more akin to personal contracts than to covenants running

76. Deed of Apr. 7, 1926 (recorded Apr. 14, 1926), in 1092 NHLR, *supra* note 1, at 337, 337. This agreement stipulated that a single-family house must be erected on the land, answering the complaint, raised *supra* note 66 and accompanying text, about the vague wording of the "residential purposes" clause in the deed. However, this placement of the single-family requirement left that particular requirement vulnerable to the possibility that it would not run with the land.

with the land to establish restrictions on the architectural appearance of the neighborhood.⁷⁷

The Jewett-McKeon snafu suggests that the design of this portion of the Company's scheme of restrictions was problematic indeed. The Company did not establish that the McKeons would be answerable for Jewett's original obligations until four years after they purchased the land—and four years after the original 1922 deadline for construction. The McKeons appear not to have been terribly amenable to this requirement; less than a week after their agreement with the Company, they sold the lot to one Thomas D. Williams.⁷⁸ This time, the requirement that a house that met architectural standards and cost more than \$7000 be constructed within two years of purchase was actually inserted into the deed, though not into the provision listing requirements that would “run with the land.” Williams, and ostensibly any successor in interest, had until March 1928 to construct a house that met the relevant standards.⁷⁹

Williams, it appears, died before he had a chance to make good on his agreement. In October 1928, seven months after the deadline, his heirs sold the lot to Morris Green.⁸⁰ Perhaps everyone had had enough of the building requirements by that point; in any case, the deed to Green “release[ed] a certain agreement made by and between The Beaver Hills Company and John J. McKeon” but also asserted that “nothing herein is to be taken as affecting or releasing in any manner the restrictions contained in a deed from The Beaver Hills Company to Arthur C. Jewett.”⁸¹ This language suggested that the building requirements registered in the Land Records Office as binding upon the McKeons had been abandoned and that Green would be subject only to the negative restrictions contained in all the Beaver Hills deeds. And, in fact, the house currently standing on that property was not erected until 1935, thirteen years after Jewett's original deadline had passed.⁸²

Given the repeated mention of the architectural restrictions and building requirements in secondary sources, it is likely that the personal contract

77. This decision contrasts sharply with what had become normal practice by the 1920s, when stipulations setting a minimum cost for homes and requiring subdivision approval of building plans were frequently inserted into deeds. See MONCHOW, *supra* note 15, at 28-31 tbl.I.

78. See Deed of Apr. 13, 1926 (recorded Apr. 14, 1926), in 1092 NHLR, *supra* note 1, at 338, 338.

79. See *id.* at 338-39.

80. See Deed of Sept. 29, 1928 (recorded Nov. 7, 1928), in 1182 NHLR, *supra* note 1, at 310, 310.

81. *Id.*

82. See City of New Haven, Assessor's Database, Vision Appraisal, <http://data.visionappraisal.com/NewhavenCT> (search for “516 Ellsworth Ave”) (registration required) (last visited Feb. 8, 2007).

between the Company and Jewett was duplicated for the other lots in the community; however, hard evidence as to why the Company chose to use personal contracts is unavailable. One possible explanation is that the reluctance of nineteenth- and early-twentieth-century courts to enforce *affirmative* covenants running with the land⁸³ convinced the Company that positive requirements—particularly requirements not concerning the land itself, but rather the buildings to be erected on it—would not be enforceable against subsequent grantees even if placed in deeds. The effects of the decision to use personal contracts, however, are more important to this study than is speculation about its underlying motivations.

What I describe as the Company's four failures—the vague wording of its residential land use restrictions, the placement of covenants in individual deeds rather than in a master declaration, the sale of larger lots than those platted on the subdivision map, and the placement of construction and architectural requirements in personal contracts that did not run with the land—might have doomed the project at its outset, particularly in conjunction with the hostile legal environment prevailing at the time. In fact, however, as I show in the next Part, they did no such thing. In spite of all these obstacles, the Company's plan for Beaver Hills was overwhelmingly successful.

III. THE UNLIKELY SUCCESS OF BEAVER HILLS

Given a legal environment that made enforcement of restrictive covenants uncertain, and decisions by the Company that left its covenant scheme more vulnerable than necessary, it may be somewhat surprising that Beaver Hills developed more or less along the lines of the Company's professed plan. None of the four failures discussed above prevented the neighborhood from developing into the "charming community" that its founders advertised.

Virtually every deed of sale issued by the Company in the first fifteen years of its existence contained more or less the same restrictions, and precisely the same wording, as the 1909 deed to Frederick Murray.⁸⁴ The deeds in this

83. See *supra* Section II.A.

84. Only two exceptions were found. In 1909, the Company leased for use as a plant nursery ten adjacent lots fronting Goffe Street to the west of Ellsworth Avenue for a term of three years. The lease stipulated that the premises were to be used only for "setting out and raising nursery stock . . . in regular rows." Deed of Sept. 8, 1909 (recorded Sept. 16, 1909), in 635 NHLR, *supra* note 1, at 240, 240. Then, in 1917, the Company sold a parcel of land south of Goffe Street, and thus outside of Beaver Hills proper, to its Secretary, Edwin Perkins, with no restrictions in the deed. See Deed of June 1, 1917 (recorded June 5, 1917), in 801 NHLR, *supra* note 1, at 505, 505.

period did, however, vary with respect to one detail: the stipulated size of front setbacks. For instance, lots fronting on Winthrop Avenue, which marked the eastern boundary of Beaver Hills, all appear to have had stipulated setbacks of thirty-five feet.⁸⁵ Lots on Norton Street, such as Murray's 1909 purchase, had stipulated setbacks of only thirty feet.⁸⁶ Finally, on Ellsworth Avenue, the stipulated setback was a full forty feet.⁸⁷ Whatever the Company's reasons for deciding to vary the setback requirement from block to block, it is clear that the decision was the result of deliberate planning, and the Company's attempt to control this aspect of the neighborhood's appearance seems to have been a ringing success. A 1924 insurance map of the neighborhood reveals striking uniformity in the distance between the front lot lines and the fronts of houses on each of the streets (Winthrop, Norton, and Ellsworth) developed in this period.⁸⁸

Additionally, the violation of implicit promises in the Company's subdivision map did not lead the Company to sell lots that were too small, nor did it lead purchasers to develop multifamily housing. The only nonconformity with the plan that resulted from these decisions was the presence of single-family houses that were larger than the surrounding homes. For example, the largest house lot in Beaver Hills was roughly two and a half times as large as the lots the Company had platted for that street.⁸⁹ That lot, 475 Ellsworth Avenue, now contains a palatial Italian villa-style house that remains an outlier among Beaver Hills residences for its size and opulence.⁹⁰ Though this house represents a variation from the original plan for the neighborhood, it is highly unlikely that the neighbors were unhappy about it. Restrictive covenant

85. See Deed of June 22, 1915, *supra* note 70, at 149; Deed of Mar. 2, 1915 (recorded Mar. 5, 1915), in 747 NHLR, *supra* note 1, at 267, 268; Deed of Dec. 3, 1909 (recorded Dec. 24, 1909), in 638 NHLR, *supra* note 1, at 484, 485.

86. See Deed of Sept. 30, 1922 (recorded Nov. 23, 1922), in 959 NHLR, *supra* note 1, at 522, 523; Deed of Apr. 5, 1920 (recorded June 2, 1920), in 887 NHLR, *supra* note 1, at 48, 49; Deed of June 7, 1917 (recorded June 22, 1917), in 802 NHLR, *supra* note 1, at 74, 75; Deed of May 11, 1917 (recorded June 1, 1917), in 801 NHLR, *supra* note 1, at 463, 463; Deed of Sept. 28, 1915 (recorded Oct. 16, 1915), in 762 NHLR, *supra* note 1, at 408, 409; Deed of Oct. 19, 1911, *supra* note 70, at 95; Deed of Sept. 25, 1911, *supra* note 70, at 486; Deed of Mar. 31, 1910, *supra* note 70, at 216; Deed of July 7, 1909 (recorded July 30, 1909), in 631 NHLR, *supra* note 1, at 439, 440; Deed of May 12, 1909 (recorded June 26, 1909), in 631 NHLR, *supra* note 1, at 212, 212.

87. See Deed of Apr. 5, 1920, *supra* note 70, at 43; Deed of Oct. 27, 1915, *supra* note 72, at 476-77; Deed of Sept. 21, 1911, *supra* note 70, at 421.

88. See 2 SANBORN 1924, *supra* note 24, No. 233.

89. See *supra* note 72 and accompanying text.

90. For further information about this house, see ELIZABETH MILLS BROWN, NEW HAVEN: A GUIDE TO ARCHITECTURE AND URBAN DESIGN 55 (1976).

schemes are typically based on an implicit hierarchy of uses, and they tend to favor expensive homes. The minimum building cost requirements in the Beaver Hills personal contracts made it clear that the neighborhood was no exception to this general tendency. The sale of larger lots allowed certain homebuyers to build houses that were larger and more expensive than the minimum threshold, and it is unlikely that a commitment not to exceed this minimum was implicit in the statement of the threshold. Thus, even in areas in which the Company did not live up to the letter of its promises to purchasers, voluntary observance of the *spirit* of those promises seems to have been the norm.

Moreover, the aberration exhibited by 516 Ellsworth was the exception rather than the rule: a thorough search of the New Haven Land Records pertaining to the Beaver Hills Company during this period did not turn up any evidence that the covenants regarding house construction were disregarded in any other cases. Most lot purchasers abided by the construction requirements that the Company placed in personal contracts, despite the fact that the Company was more or less powerless to enforce these requirements once the original purchaser had sold his lot to someone else. Figure 2 indicates that construction on most Norton, Winthrop, and Ellsworth lots had taken place by 1924,⁹¹ and a walk through the neighborhood today confirms that a standard dictating a certain degree of architectural sophistication was successfully applied. The neighborhood's array of Tudor Revival, Colonial Revival, Neoclassical, and Craftsman homes evidences the attention to architectural style and detail common in upper-middle-class neighborhoods built in the early twentieth century.⁹² The Company's unusual strategy of using personal contracts to regulate the timing and style of homebuilding on its lots appears largely to have produced the desired results.

All in all, then, there is no evidence of any widespread or significant nonconformity with the deed or contract restrictions for Beaver Hills lots sold in the first fifteen years of the Company's existence. But the success of the neighborhood is a mystery. Why did economic incentives fail to induce the Company to vary its deeds from purchaser to purchaser? Given a legal environment that was quite permissive with regard to this issue, why didn't economic incentives induce lot purchasers to violate poorly worded or formally deficient restrictions? Purchasers' substantial compliance with the restrictions, despite the lack of recourse available to the Company and to their neighbors if

91. See 2 SANBORN 1924, *supra* note 24, No. 233.

92. For more on the Beaver Hills architecture, see BROWN, *supra* note 90, at 54–55.

they failed to comply, suggests that their actions were guided by factors other than the threat of enforcement.

IV. MAKING SENSE OF BEAVER HILLS

This Part proposes that the unlikely success of Beaver Hills was due to the fact that its covenants functioned less as binding legal commitments than as signals more akin to social norms. It then introduces the Company's behavior around the time that New Haven instituted its first zoning ordinance as further support for that proposal.

A. Covenants as Signals and Social Norms

The frequent comparisons between restrictive covenants and zoning, introduced above, tend to imply that covenants are a form of "private law."⁹³ Like statutes or ordinances, restrictive covenants are written, formalized rules. As a contractual mode of regulation, restrictive covenants depend on the state for their enforcement. The description of restrictive covenants as "private zoning" emphasizes their formal resemblance and institutional relationship to public law.⁹⁴ But the history of Beaver Hills strongly suggests that restrictive covenants in that era, in the form in which the Company was using them, were not functioning as laws. Covenant schemes lacked the unequivocal support of courts and other legal institutions, and the design of the Company's scheme contained loopholes sizable enough to lead to rampant abuse. In other words, these covenants lacked the compulsory force of laws or even of most contracts. Yet the people who accepted them, for the most part, did not violate them. This puzzling aspect of the Company's history becomes less puzzling when the Beaver Hills restrictive covenants are thought of not as private versions of public law but as written embodiments of *social norms*.

Scholarly literature on the relationship between law and social norms is abundant.⁹⁵ The comparison of restrictive covenants to social norms, however, is not terribly common within that body of writing.⁹⁶ A classic formulation in

93. See *supra* notes 15-16 and accompanying text.

94. Hansford, *supra* note 15, at 547 (quoting Harris, *supra* note 15, at 137).

95. For a fairly comprehensive list, see Richard H. McAdams, *Signaling Discount Rates: Law, Norms, and Economic Methodology*, 110 YALE L.J. 625, 626 nn.6-11, 627 n.12 (2001), which reviews ERIC A. POSNER, *LAW AND SOCIAL NORMS* (2000).

96. For a rare and recent exception, see Richard R.W. Brooks, *Covenants & Conventions* 3 (July 2005) (unpublished manuscript, on file with author), which argues that racially restrictive

the field pointedly distinguishes norms, which are enforced by the “third-party” control of “social forces,” from contracts, which are ostensibly enforced through “second-party control.”⁹⁷ But the covenants used by the Beaver Hills Company were of course very different from bilateral personal contracts.⁹⁸ The Beaver Hills covenants, which were ostensibly between the Company and the purchaser but were in fact beneficial to and enforceable by third parties (other purchasers), were in their substance—if not in their form—regulations subject to third-party control. And, like social forces, these covenants offered the parties a significantly weaker guarantee of state enforcement than would traditional contracts.

Prior scholarship has invoked social norms as the reason for the remarkable degree of land use coordination in the affluent Willow-Canner section of New Haven’s East Rock neighborhood, which was developed in the late nineteenth and early twentieth centuries. The neighborhood’s development preceded the birth of zoning and extensive public land use regulation, and restrictive covenants were never used in that neighborhood.⁹⁹ Yet the neighborhood displays striking uniformity in lot size, building coverage, height, and land use.¹⁰⁰ One author attributes this paradoxical phenomenon to “factors outside of the legal regime,” including “social custom.”¹⁰¹

Both the similarities and the differences between East Rock and Beaver Hills are telling. In both cases, land use coordination appears to have been achieved without assistance from the formal legal system. Given the legal weaknesses of the Beaver Hills covenant scheme and the uncertainty of its legal context, it might be tempting to conclude that there, as in East Rock, social norms explain why purchasers were willing to risk the purchase of a restricted lot without a guarantee that similar restrictions would apply to their neighbors, and why more individuals did not seek to escape the Company’s construction guidelines by selling their lots, as did Arthur Jewett. But Beaver Hills had covenants, and East Rock did not. One has to wonder why, if social norms would be the ultimate arbiters of the development of the neighborhood, the Company would choose to undertake both the risks associated with the

covenants served not as “legal commitments” but as “discriminatory customs and exclusionary conventions.”

97. ROBERT C. ELLICKSON, ORDER WITHOUT LAW 126-27 (1991).

98. The unique status of covenants that run with the land, and particularly their resemblance both to contracts and to servitudes or easements, has long been acknowledged. See, e.g., CLARK, *supra* note 49, at 172-74.

99. Cappel, *supra* note 8, at 632, 629 n.84.

100. See *id.* at 623-26.

101. *Id.* at 632.

widespread perception that covenants lowered the value of land and the transaction costs involved in creating a covenant scheme. The answer must be that despite the foregoing the covenants were expected to, and indeed did, matter.

One of the most important contributions of social norms theory to the social sciences is its ability to explain many apparent oddities or anomalies of human behavior.¹⁰² An awareness of social norms provides insight into alternative motivations for behavior that may appear to violate simple prescriptions of rational self-interest. A more specific theory that invokes the explanatory power of social norms is the theory of “signaling.” Signaling models of social norms explain that seemingly costly behavior may actually be profitable, insofar as it sends signals to other parties that will induce them to cooperate in the future.¹⁰³ According to these models, the very costliness of the behavior can be the source of its value in inducing cooperation from others, as costly behavior indicates that one values long-term gains highly relative to short-term gains and is thus unlikely to defect from a long-term cooperative relationship.¹⁰⁴ For example, a job-seeker who obtains educational credentials in order to persuade a potential employer to hire him is engaging in signaling,¹⁰⁵ as is a merchant organization that invests in unnecessarily opulent buildings in order to persuade potential customers to do business with it.¹⁰⁶ Signaling theory has received its share of criticism;¹⁰⁷ however, as a broad framework for understanding the Beaver Hills story, it is undeniably useful. Indeed, other scholars have also proposed, though without extensive evidentiary support or further elaboration, that restrictive covenants may serve a signaling function.¹⁰⁸

102. Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 907 (1996).

103. See POSNER, *supra* note 95, at 19-24; Michael Spence, *Job Market Signaling*, 87 Q.J. ECON. 355 (1973); see also David Austen-Smith & Jeffrey S. Banks, *Cheap Talk and Burned Money*, 91 J. ECON. THEORY 1 (2000) (proposing that non-costly signaling may also serve a function complementary to that of costly signaling); Edward M. Iacobucci, *Toward a Signaling Explanation of the Private Choice of Corporate Law*, 6 AM. L. & ECON. REV. 319 (2004) (applying signaling theory to corporate governance behaviors).

104. See POSNER, *supra* note 95, at 18.

105. See Spence, *supra* note 103, at 355-58.

106. See POSNER, *supra* note 95, at 20-21.

107. See, e.g., Dan M. Kahan, *Signaling or Reciprocating? A Response to Eric Posner's Law and Social Norms*, 36 U. RICH. L. REV. 367 (2002); McAdams, *supra* note 95.

108. See Gillette, *supra* note 31, at 1395-96; see also Fennell, *supra* note 40, at 844; Brooks, *supra* note 96, at 3. Among these authors, only Richard Brooks has offered detailed empirical evidence in support of this assertion.

The Beaver Hills covenants appear to have served the interest of the Company not because they were an enforceable legal commitment conferring concrete net benefits on purchasers, but because they signaled to purchasers that the Company was a desirable transactional counterparty. As discussed above, many contemporary courts and commentators expressed the opinion that covenants *lowered* the value of the property they encumbered.¹⁰⁹ This very fact may have *enhanced* the covenants' effectiveness as signals. Signaling theory revolves around the ways in which behavior that appears costly or irrational may actually generate value. Thus, the risks and the diminution of value that the covenants implied may have been precisely their selling point because they evidenced the Company's long-term commitment to the community.

Indeed, the Company may not have been the only party engaged in signaling behavior. A commonly used concept in the literature of signaling (and in that of social norms more generally) is that of the "norm entrepreneur," a party responsible for the invention or evolution of new social norms. By behaving in a way that defies or transcends existing social norms, norm entrepreneurs induce other parties to behave in a similar way, thereby turning the new behavior into a new norm.¹¹⁰ Acting as a norm entrepreneur may bring economic benefits.¹¹¹ For example, sellers of commercial goods can act as norm entrepreneurs—as when merchants "use advertisements to promote a style of life that requires the purchase of their goods."¹¹² Similarly, the Company was in a position to reap extensive economic benefits if it could

109. See *supra* note 42. Of course, the same courts that decried covenants for their value-decreasing effect also tended to be reluctant to enforce them unless they were formally above reproach. See *supra* Section II.A. This arguably presents a contradiction: how could covenants decrease property values if they were unenforceable and thus legally irrelevant? But the existence of court opinions like those discussed *supra* Section II.A indicates that covenants did give rise to litigation with some frequency. Even if most of this litigation ended without enforcement of the covenant, the litigation itself would have been quite costly. In other words, covenants were made costly by the very possibility of litigation because they created potential rights of action between neighbors, or by the Beaver Hills Company against its purchasers, when there otherwise would have been none.

110. See, e.g., Sunstein, *supra* note 102, at 929-30.

111. It is probably somewhat more common, however, for scholars to emphasize the noneconomic or non-self-interested nature of the motivations of norm entrepreneurs. See, e.g., Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L ORG. 887, 898 (1998) (asserting that norm entrepreneurs in the political arena tend to be motivated by "empathy, altruism, and ideational commitment"); see also Sunstein, *supra* note 102, at 929-30 (asserting that norm entrepreneurs in the political sphere serve to overcome the "free rider problem" inherent in replacing an old norm with a new norm).

112. POSNER, *supra* note 95, at 31.

induce New Haven homebuyers to engage in a particular kind of costly activity—specifically, the purchase of a deed-restricted lot.

Beaver Hills lot purchasers were making a promise to their prospective neighbors by purchasing their lots. Their promise did not, however, gain them a reciprocal promise from their neighbors—through either the *Sanborn* common plan doctrine or a declaration of restrictions, neither of which was available to the Beaver Hills purchasers.¹¹³ Under these conditions, the purchase of a restricted lot was certainly costly and thus may have been a signal in its own right—one directed toward *subsequent* purchasers. Subsequent purchasers could discern from a title search that earlier Beaver Hills homebuyers were desirable neighbors—people willing to make the extravagant gesture of a unilateral promise. This may well have induced the subsequent purchasers to pay more for their lots, benefiting both the Company and, potentially, those earlier purchasers, as a higher purchase price for lots near their own likely brought higher property values for the entire neighborhood.

If this hypothesis is accurate, then it certainly would have been in the economic self-interest of the Company, acting as a norm entrepreneur, to turn the purchase of a deed-restricted lot into a signal of cooperativeness. The builder's gesture of creating the deed restrictions may have spawned in early purchasers the idea that, by purchasing a deed-restricted lot, they could signal their own cooperative tendencies and thereby attract neighbors quickly. Moreover, the neighbors drawn by these signals were likely to have been the sort of people who shared those cooperative tendencies.¹¹⁴ The signals sent by the covenants constituted, in a sense, a means of selecting for residents who were willing to abide by them. This, in turn, helps to explain not only why early purchasers for the lots materialized despite the risks and costs involved in their purchase, but also why the Company's plan for the neighborhood was successful despite its tenuous legal force.

B. Covenants and Zoning: The Surprising History of Upper Ellsworth and Colony Road

The strongest evidence that the Beaver Hills covenants functioned less as private laws than as social norms, however, comes from a relatively late date in the neighborhood's history. The timing of the Company's lot sales provides a fascinating opportunity to augment with empirical evidence the frequently

113. See *supra* Section II.A.

114. See Fennell, *supra* note 40, at 844 (“[A] covenant provides a convenient way of drawing together those for whom such a covenant would represent a gain . . . , while screening out those for whom such a covenant would represent a loss.”).

made comparisons between private land use regulation devices, such as deed restrictions, and public regulation, such as zoning. When the Connecticut legislature passed a law enabling New Haven to enact a zoning ordinance in 1921,¹¹⁵ the Company had been using the same covenant template for thirteen years. In 1922, the city formed a Zoning Commission, and a draft ordinance was proposed in 1923. It took several more years and some organizational upheaval before the city passed a comprehensive zoning ordinance in December 1926.¹¹⁶

Zoning in its simplest form consists of “[t]he segregation of industries, commercial pursuits, and dwellings to particular districts in a city,” in order to “prevent congestion of population, secure quiet residence districts, expedite local transportation,” and promote “the safety and health of the community.”¹¹⁷ A typical zoning ordinance, such as that enacted by New Haven in 1926, provides different regulations regarding land use and building standards in each district. In residential districts, for example, New Haven regulated lot coverage, setbacks, yard size, and building height.¹¹⁸ Many early zoning ordinances, including New Haven’s, did not just segregate industrial and commercial from residential uses but also created separate districts for single-family and multifamily housing.¹¹⁹

Zoning is perhaps the most controversial aspect of modern land use regulation. Scholars have decried zoning as state endorsement of a “spatial hierarchy” grounded in race and class,¹²⁰ as destructive of urban heterogeneity,¹²¹ and as conducive to the waste of land and to political corruption.¹²² Other scholars have focused on what they perceive as the inefficiency of zoning, emphasizing the system’s tendency to produce political or otherwise arbitrary results rather than the optimal results that would be produced by market-based solutions.¹²³ Critics of zoning frequently point to

115. Christina G. Forbush, *Striving for Order: Zoning the City of Elms* 3 (May 9, 1997) (unpublished manuscript, on file with author).

116. See RAE, *supra* note 5, at 261-62; Forbush, *supra* note 115, at 3.

117. *City of Aurora v. Burns*, 149 N.E. 784, 788 (Ill. 1925).

118. NEW HAVEN, CONN., ZONING ORDINANCE art. XII (1926).

119. *Id.* arts. III-IV; see also *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 394-95 (1926).

120. RAE, *supra* note 5, at 263.

121. *Id.*; see also JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* (1961) (surveying the negative effects of zoning).

122. See Siegan, *Best Zoning*, *supra* note 14, at 137-38.

123. See Ellickson, *supra* note 14, at 694-710; see also Siegan, *Best Zoning*, *supra* note 14, at 137-38. But see Fennell, *supra* note 40, at 850 (noting that the “problem of uniform rules,” which

restrictive covenants as a preferable and broadly (if not perfectly) interchangeable alternative.¹²⁴

Contemporary theories about the relationship between zoning and deed restrictions propose that each helps to further the goals of the other and that the establishment of one could reduce the need for reliance on the other. For the purchaser of deed-restricted lots in a residential subdivision, zoning could serve as a useful insurance policy against the possibility that sloppily drafted restrictions or skeptical courts might erode her ability to rely on the benefits of her neighbors' compliance with the same restrictions. Moving into a neighborhood zoned for residential use, with the accompanying restrictions on setbacks and lot coverage, should provide just as much certainty and value as moving into a neighborhood with a covenant scheme guaranteed by a documented common plan.¹²⁵ Given this analysis, the decisions that the Company made immediately following the passage of New Haven's first zoning ordinance are somewhat surprising.

That ordinance zoned the Beaver Hills neighborhood as a Class A residential district, for single-family housing only.¹²⁶ The areas immediately adjacent to the neighborhood were zoned as Class B residential, which meant that detached two-family homes (but not larger apartment buildings) were permitted.¹²⁷ The ordinance also required houses in Class A residential districts to be set back twenty-five feet from the street and required any permitted accessory buildings, such as garages, to be at least thirty feet from the street.¹²⁸ These setback requirements were less rigorous than those in the deeds discussed above, the least stringent of which required thirty-foot front setbacks.¹²⁹

renders zoning inefficient, can also create inefficiencies in a restricted residential development).

124. See sources cited *supra* note 15.

125. This assumption, of course, ignores the phenomenon of zoning variances, which have provided quite a bit of fodder for zoning's critics. See, e.g., Ellickson, *supra* note 14, at 693-94. Despite the fact that applications for variances began in earnest in New Haven as soon as the first zoning ordinance was passed, Forbush, *supra* note 115, at 86, the Beaver Hills deeds described below are all derived from a model that, in all likelihood, long predates widespread public perception of the dangers posed by variances.

126. The 1926 zoning ordinance divided residential neighborhoods into four classes: A (single-family houses only); AA (limited construction of apartment buildings permitted); B (two-family houses permitted); and C (apartment housing permitted). See NEW HAVEN, CONN., ZONING ORDINANCE arts. III-VI (1926).

127. See *id.* appended map.

128. *Id.* §§ 1202, 1207.

129. See *supra* note 86 and accompanying text.

In response to the institution of these zoning requirements, the Company changed its deed restrictions. Within a year after the ordinance was passed, the Company, after relying for almost eighteen years on the language in the Murray Deed,¹³⁰ rewrote its deed restrictions for the first time. Moreover, in that same year the Company also ended its nearly eighteen-year-old practice of using the same model restrictions in the deeds to all the lots it sold.

In 1927, the Company began selling lots on the northern stretch of Ellsworth Avenue, between Glen and Dyer. (Ellsworth south of Glen was already largely developed by this point.¹³¹) Three lots on this block¹³² were sold with the Murray restrictions plus two significant additions. First, the new model deed provided that the lot was “subject to building lines if established, and all provisions of any zoning ordinance enacted by the City.”¹³³ Second, the “residential use” clause of the Murray Deed, the weakness of which has been discussed above,¹³⁴ was replaced by a stipulation that the “premises shall be used for no other than the private residence of one family.”¹³⁵ In keeping with the rest of Ellsworth, the required setbacks in all three deeds were forty feet for houses and 100 feet for auxiliary buildings.¹³⁶ Also in 1927, two other lots in the same block of Ellsworth¹³⁷ were sold with restrictions identical to the ones just described in all but two respects: these deeds stipulated not only that no structure other than a single-family dwelling could be erected on the land, but also that no “dwelling on said lot [shall] be altered to accommodate more than one . . . family” before 1935, and that no garage erected on the lot could accommodate more than two cars.¹³⁸

Oddly enough, this tightening of the restrictions, after almost two decades of inertia, occurred precisely when the zoning ordinance had made the

^{130.} See *supra* note 32 and accompanying text.

^{131.} See 2 SANBORN 1924, *supra* note 24, No. 233.

^{132.} See Map of Building Lots Owned by the Beaver Hills Company No. 4, *supra* note 25.

^{133.} Deed of May 4, 1927 (recorded May 6, 1927), in 1131 NHLR, *supra* note 1, at 204, 204; see also Deed of Mar. 16, 1927 (recorded Mar. 23, 1927), in 1129 NHLR, *supra* note 1, at 354, 354-55 [hereinafter Deed A of Mar. 16, 1927]; Deed of Mar. 16, 1927 (recorded Mar. 23, 1927), in 1129 NHLR, *supra* note 1, at 352, 353 [hereinafter Deed B of Mar. 16, 1927].

^{134.} See *supra* notes 66 and accompanying text.

^{135.} Deed A of Mar. 16, 1927, *supra* note 133, at 355; Deed B of Mar. 16, 1927, *supra* note 133, at 353.

^{136.} Deed of May 4, 1927, *supra* note 133, at 204; Deed A of Mar. 16, 1927, *supra* note 133, at 355; Deed B of Mar. 16, 1927, *supra* note 133, at 353.

^{137.} See Deed of May 31, 1927 (recorded June 3, 1927), in 1134 NHLR, *supra* note 1, at 152, 152; Deed of May 12, 1927 (recorded May 23, 1927), in 1133 NHLR, *supra* note 1, at 22, 22; Map of Building Lots Owned by the Beaver Hills Company No. 4, *supra* note 25.

^{138.} Deed of May 31, 1927, *supra* note 137, at 153; Deed of May 12, 1927, *supra* note 137, at 22.

alterations redundant. The major innovation of these 1927 deeds—the explicit restriction of the lots to single-family residential use—duplicates precisely the one major restriction that zoning Beaver Hills as a Class A residential district had *added* to the already restricted subdivision.¹³⁹ Even the stipulation in two of the deeds that limited garages to two cars each was only slightly stricter than the zoning ordinance, which limited Class A garages to a three-car capacity.¹⁴⁰

If the 1926 zoning ordinance made these innovations redundant in their content, the ordinance made another innovation, dating from 1926, redundant in its *form*. Around that time, the Company began selling lots along Colony Road, a new street laid out parallel to and west of Ellsworth.¹⁴¹ In April 1926, a lot on Colony between Goffe and Moreland was sold to F. Lorne Wheaton. The “Wheaton Deed” contains the familiar language of the restrictions of the Murray Deed, but it was augmented by the further stipulation that any dwelling erected on the lot should accommodate no more than, and should not be altered to accommodate more than, one family.¹⁴² The Wheaton Deed also contained a sentence unlike any found in earlier Beaver Hills deeds: “Grantor agrees that it will not sell any lot on either side of the street in the block on which the land herein conveyed is located except subject to the above restrictions.”¹⁴³ The deed then went on to specify the lots to which this agreement would apply.¹⁴⁴

139. See NEW HAVEN, CONN., ZONING ORDINANCE art. III (1926).

140. See *id.* §§ 100(13), 301(5).

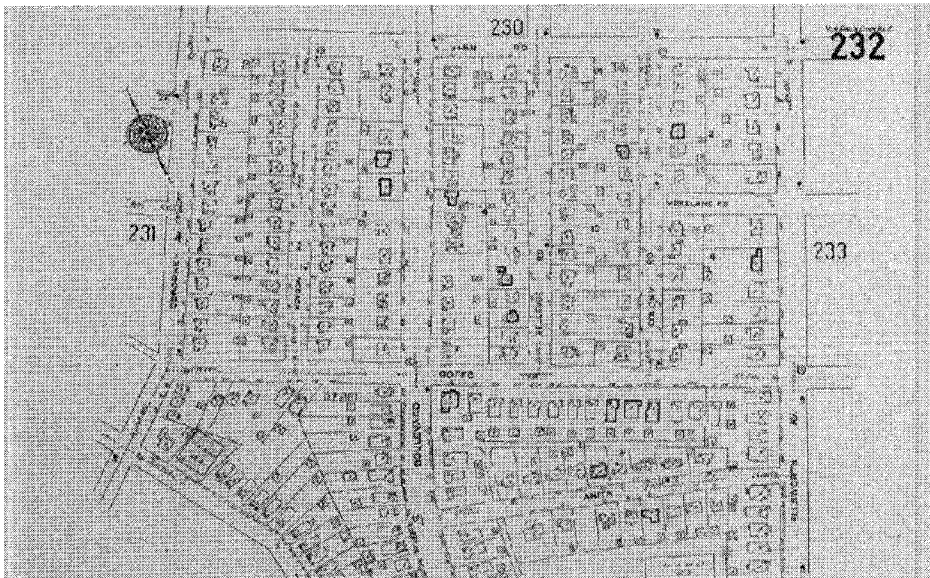
141. Cf. 2 SANBORN MAP CO., INSURANCE MAPS OF NEW HAVEN, CONNECTICUT No. 232 (1973), available at http://images.library.yale.edu/newhavensids/1973/sb1973_232.sid (requires ExpressView plugin). This map is reproduced as Figure 3.

142. Deed of Apr. 21, 1926 (recorded May 5, 1926), in 1094 NHLR, *supra* note 1, at 370, 371 [hereinafter Wheaton Deed].

143. *Id.*

144. *Id.*; cf. Map of Building Lots Owned by the Beaver Hills Company No. 4, *supra* note 25. On the same date that Wheaton’s lot was conveyed to him, the Company also amended the deed to a lot sold the previous year on the same block to Merrill Jenkins. Jenkins’s original 1925 deed, Deed of Dec. 16, 1925 (recorded Dec. 28, 1925), in 1083 NHLR, *supra* note 1, at 76, 76, had contained the same language as the Murray Deed. But the amended deed, in recognition of “certain obligations” Jenkins had undertaken to the Company, Deed of Apr. 21, 1926 (recorded May 5, 1926), in 1094 NHLR, *supra* note 1, at 372, 372-73, contained the same promise from the Company as that found in the Wheaton Deed, *supra* note 142.

Figure 3.
MAP OF BEAVER HILLS IN 1973



The Company appears to have kept the promise it made in the Wheaton Deed. Between 1926 and 1930, the Company sold at least eleven more lots on Colony Road with the same restrictions and the same guarantee of uniform restrictions on a block. The blocks between Goffe and Moreland and between Moreland and Glen on that street were all subject to those restrictions and to that guarantee, and the required setback for houses on all of these lots was twenty-five feet.¹⁴⁵

The Colony Road deeds are noteworthy for several reasons. First, like the 1927 deeds to the Ellsworth lots, their content more or less duplicated the

145. See Deed of Feb. 13, 1930 (recorded Feb. 28, 1930), in 1218 NHLR, *supra* note 1, at 362, 362-63; Deed of Feb. 3, 1930 (recorded Feb. 28, 1930), in 1218 NHLR, *supra* note 1, at 359, 360; Deed of Dec. 24, 1928 (recorded Dec. 31, 1928), in 1185 NHLR, *supra* note 1, at 280, 281; Deed of Apr. 13, 1928 (recorded Apr. 18, 1928), in 1166 NHLR, *supra* note 1, at 66, 67; Deed of Dec. 5, 1927 (recorded Dec. 27, 1927), in 1152 NHLR, *supra* note 1, at 460, 460; Deed of Sept. 21, 1927 (recorded Oct. 20, 1927), in 1144 NHLR, *supra* note 1, at 199, 199-200; Deed of Aug. 1, 1927 (recorded Aug. 18, 1927), in 1139 NHLR, *supra* note 1, at 318, 319; Deed of July 15, 1927 (recorded July 21, 1927), in 1139 NHLR, *supra* note 1, at 106, 107; Deed of Apr. 27, 1927 (recorded May 10, 1927), in 1131 NHLR, *supra* note 1, at 254, 254; Deed of June 10, 1926 (recorded June 28, 1926), in 1101 NHLR, *supra* note 1, at 41, 42; Deed of June 2, 1926 (recorded June 8, 1926), in 1100 NHLR, *supra* note 1, at 130, 130-31; cf. Map of Building Lots Owned by the Beaver Hills Company No. 4, *supra* note 25.

zoning ordinance's rules for Class A neighborhoods.¹⁴⁶ Second, the reciprocity guarantee within the deeds effectively created the same sort of promise that would have been created either by the filing of a common plan for the neighborhood or by judicial endorsement of the *Sanborn* common plan doctrine in Connecticut.¹⁴⁷ Third, that sort of promise would itself have been made unnecessary by the passage of the zoning ordinance, given that its restrictions were more or less identical to those contained in the ordinance.¹⁴⁸

Thus, the innovations in the Beaver Hills deeds in the late 1920s confound all reasonable predictions. The Company had, for nearly two decades, largely succeeded in creating a regulated neighborhood. It had succeeded in convincing buyers to purchase deed-restricted lots without any guarantee that their neighbors would be similarly restricted; these purchasers included individuals who, like the first buyers on Colony Road, had been in the particularly dangerous position of being the first residents on a newly opened street. Connecticut courts had, during the period from 1908 to 1926, become friendlier toward the enforcement by multiple interested parties of subdividers' covenants.¹⁴⁹ The introduction of zoning should only have made the

146. The careful reader will note that the Wheaton Deed, *supra* note 142, was actually drafted roughly eight months before New Haven's zoning ordinance was finalized in December 1926. But this fact is not terribly relevant to the issue here. As discussed above, a draft ordinance had been issued as early as 1923, and it is quite likely that in April 1926 much of New Haven was anticipating the release of a final ordinance. The map attached to the draft ordinance included the area that would become Colony Road within the Class A district encompassing the rest of the Company's land, meaning that the Company would have had no reason to suspect that Colony Road would not be zoned in Class A. See Forbush, *supra* note 115, appended maps. Thus, the Company and purchasers would not have gained anything from the addition of a single-family use requirement to the covenants.

147. The irony of the timing of the restrictions' creation is perhaps amplified by the fact that they postdate the *Sanborn* decision by only a year and predate the implicit rejection of *Sanborn* by the Connecticut Supreme Court. See *supra* notes 60-64 and accompanying text.

148. As discussed *supra* note 146, the fact that the final zoning ordinance had not yet been enacted when the Wheaton Deed was drafted does not diminish the fundamental redundancy of the reciprocity guarantee. After all, the one baseline characteristic of every zoning ordinance is that it imposes uniform standards on all construction within a given geographic area. As long as the Company believed that any ordinance would indeed be passed in the foreseeable future, the mutuality guarantee was redundant.

Another interesting question is whether the contractual agreements regulating the cost and construction of houses, see *supra* Section II.B, also contained a guarantee of similar treatment of all lots on a block. A guarantee in that case would *not* have been made redundant by the zoning ordinance, as those restrictions did not duplicate restrictions in the ordinance. However, a guarantee in these agreements might also have had limited force, given that nothing in the agreements appears to have prevented the original purchaser of a lot from reselling it *without* the restrictions. See *supra* Section II.B.

149. See *supra* note 58 and accompanying text.

subdividers' job of creating covenant schemes easier and less risky. It is counterintuitive that overall success, a warming legal environment, and, most of all, the codification into public law of many of the private restrictions that governed Beaver Hills would have induced the Company to make its restrictions *more* stringent.

Even more surprising is the fact that the Company *only* tightened the restrictions enough to duplicate or reiterate the effect of the zoning ordinance. With the minor exception of limiting the capacity of garages to two instead of three cars, the upper Ellsworth and Colony Road restrictions added no legal value over the zoning ordinance at all.¹⁵⁰ The earlier scheme may have been unenforceable, but the later covenants would never need to be enforced because the City's zoning code would do the exact same work that enforcement of the covenants would have done.

The intensive restrictions that governed the development of Colony Road marked the high point of the Beaver Hills covenant scheme. Even while Colony Road was still being developed, the Company abandoned the use of deed restrictions in its sales of lots in areas of the neighborhood that were developed in later years. The first virtually unrestricted deed that my research has uncovered accompanied a pair of lots fronting Ella T. Grasso Boulevard, at the western boundary of the Company's land, that were sold in 1929. This deed provided only that the purchaser should comply with all applicable zoning ordinances and building lines and that no fences were to be erected beyond the building lines.¹⁵¹ For the remainder of the Company's existence, this was the extent of the restrictions that would accompany all new deeds except those to lots on Colony Road between Goffe and Glen. Lots with these minimal restrictions were sold on the Boulevard,¹⁵² on Bellevue Road (another new road

150. It is important to remember, however, that the Colony Road lots were presumably subject to the building requirements memorialized in the personal contracts discussed *supra* Section II.B. These requirements of course exceeded those in the zoning ordinance. But their presence does nothing to explain the tightening of the deed restrictions. It is also completely unclear whether these requirements were phased out, as were the deed restrictions, beginning in 1929. Because the personal contracts set a two-year construction deadline, the 1935 sunset clause would not have altered their effect. Unfortunately, in the absence of further documentary evidence on the personal contracts, one can only speculate about how they were handled in the Company's final years.

151. Deed of May 16, 1929 (recorded May 29, 1930), in 1229 NHLR, *supra* note 1, at 30, 30.

152. See Deed of May 24, 1933 (recorded May 31, 1933), in 1292 NHLR, *supra* note 1, at 266, 266; Deed of June 13, 1930 (recorded Feb. 26, 1931), in 1248 NHLR, *supra* note 1, at 188, 189.

that ran parallel to and between Colony and the Boulevard),¹⁵³ and on the block of Colony Road between Glen and Dyer Streets, north of the earlier-developed restricted blocks.¹⁵⁴

As an immediate reaction to the zoning ordinance, the gradual elimination of restrictions by the Company would have made far more sense than the heightening of restrictions that actually took place following enactment. Thus, it may be tempting to see the phasing out of restrictions as a delayed reaction to the ordinance, but that interpretation is implausible for several reasons. First, it is undeniable that from a chronological perspective the Company's tightening of its covenant scheme is far more closely linked to the zoning ordinance. Second, there is a ready alternative explanation for the Company's later elimination of its deed restrictions. The first unrestricted lots were sold in 1929, and lot sales proceeded at a noticeably slower pace from that point on. The Depression was almost certainly a factor in this slowing. Moreover, the Beaver Hills deed restrictions were due to expire in 1935. The Company may have been desperate to conclude its land sales, and it may have determined that the incremental gain from selling unrestricted lots would outweigh the signaling value of a restrictive covenant with a very short remaining life.¹⁵⁵

This unintuitive aspect of the history of Beaver Hills constitutes further evidence in support of this Note's basic thesis: restrictive covenants in that neighborhood were not analogous to or interchangeable with public law. They did not serve the same or similar purposes that zoning did. If they had, the Company should have seen no reason to revise them to proscribe precisely the same behavior proscribed by New Haven's zoning ordinance.

Once again, the theory of social norms helps to shed light on the question of what purpose the updated covenants *did* serve. The zoning regulations governing Class A districts may well have led to an adjustment of the signals

153. See Deed of Aug. 5, 1936 (recorded Aug. 12, 1936), in 1343 NHLR, *supra* note 1, at 344, 344; Deed of Apr. 7, 1932 (recorded Apr. 18, 1932), in 1271 NHLR, *supra* note 1, at 195, 196; Deed of Aug. 1, 1931 (recorded Aug. 8, 1931), in 1255 NHLR, *supra* note 1, at 507, 508.

154. See Deed of Apr. 6, 1931 (recorded Apr. 15, 1931), in 1248 NHLR, *supra* note 1, at 477, 478; Deed of May 29, 1929 (recorded June 27, 1929), in 1203 NHLR, *supra* note 1, at 169, 170.

155. The areas north and west of the Company's land were developed by the Farnham family, another large landowner in the area, beginning in 1929 and throughout the 1930s and 1940s. Like the Company, the Farnhams sold their land with covenants that restricted construction to single-family houses. Deed of July 30, 1930 (recorded Aug. 2, 1930), in 1231 NHLR, *supra* note 1, at 542, 543; Deed of Nov. 1, 1929 (recorded Nov. 2, 1929), in 1210 NHLR, *supra* note 1, at 375, 376. Unlike the Company's land, the Farnham land was designated a Class B district under the 1926 zoning ordinance. See NEW HAVEN, CONN., ZONING ORDINANCE appended map (1926). This meant that the city allowed construction of two-family houses, and thus the restrictions in the Farnham deeds likely served a different function from that of the Company's restrictions.

governing the market for subdivision lots in New Haven. Previously, a community builder might have sent all the necessary signals of cooperativeness by restricting its lots to residential use and by designating setbacks through individual deed restrictions. But the Class A regulations essentially *raised the signaling stakes*: single-family restrictions, restrictions on garage capacity, and a guarantee of street-wide application of the same restrictions had suddenly and prominently been introduced into the community of subdividers and lot purchasers as signals that a subdivider could choose to send. By choosing *not* to send them, a subdivider would leave itself vulnerable to doubts about its desirability as a transaction partner.

Implicit in the discussion of signaling is the assumption that parties sometimes choose to send signals as much to avoid negative consequences as to obtain positive benefits.¹⁵⁶ It seems that, perhaps unwittingly, the New Haven Zoning Commission in 1926 usurped the role of a norm entrepreneur in an area (land use restrictions) in which the Company had previously occupied that niche. The Zoning Commission may or may not have had an economic motivation to act as a norm entrepreneur, as private developers did.¹⁵⁷ Nonetheless, its enactment of the zoning ordinance had the same effect as that of the entrance of a new norm entrepreneur, and the highly publicized nature of the Commission's actions allowed it to play that role extremely effectively. With the enactment of the ordinance, the new norm for conscientious and progressive land use regulation in New Haven changed from a written promise of residential use to a written promise of both *single-family* residential use and application of that promise to an entire block, as opposed to a single lot. The Beaver Hills Company must have feared that, by not clearly stating its allegiance to this new norm, it would be perceived as effectively violating it.

CONCLUSION

Conceptions of restrictive covenants that treat these covenants as analogous to and interchangeable with public law fail to explain the history of the use of

¹⁵⁶ Cf. POSNER, *supra* note 95, at 25-26 (noting that signaling patterns may induce people to engage not only in costly behavior that serves as a positive signal but also in cheap behavior to avoid punishment for "deviation from the norm").

¹⁵⁷ In fact, a number of scholars have focused attention on the ways in which zoning ordinances may serve the fiscal self-interest of local governments. See, e.g., WILLIAM A. FISCHER, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES* 51-57 (2001); Bruce W. Hamilton, *Zoning and Property Taxation in a System of Local Governments*, 12 URB. STUD. 205, 205-06 (1975). So perhaps it is not far-fetched to suggest that the city was acting as a profit-oriented norm entrepreneur in this case.

covenants in Beaver Hills. The history of Beaver Hills becomes comprehensible only when we conceive of the neighborhood's covenant scheme as analogous to a set of social norms and approach it with an eye toward signaling theory. The insight that restrictive covenants might function analogously to social norms, and that they almost certainly *did* function that way in the past, points to several hypotheses relevant even in today's very different context.

First, the relationship between restrictive covenants and social norms might be responsible for some of the present-day differences between the way American courts approach zoning and other land use ordinances and the way they approach covenant-based regimes. For example, the differing levels of flexibility inherent in covenant-based regimes and zoning regimes were discussed as early as the 1920s.¹⁵⁸ Variances to zoning, commentators noted, were regularly granted, and such variances did not serve to invalidate the underlying regulations. However, a court's determination that it would be inequitable to enforce covenant restrictions in a particular case generally led to the wholesale invalidation of those restrictions.¹⁵⁹ Thus, as contemporary scholars have noted, covenants remain relatively inflexible.¹⁶⁰ Homeowners' associations endowed with the power to alter covenants temper this inflexibility somewhat,¹⁶¹ but it remains the case that *individual* exceptions to covenant schemes are rarely granted.¹⁶² The general rule that covenant schemes must apply to *all* homeowners subject to them, in all circumstances, has been justified with reference to the goal of maintaining the "social fabric" of restricted communities.¹⁶³

This phenomenon dovetails with my conclusions and suggests that courts implicitly agree that covenants serve very different goals than public land use law. Promoting a land use scheme that is rational from an economic, environmental, or aesthetic perspective may be a less important function for covenants than fostering a community that is forged by and dependent on the

158. See M.T. Van Hecke, *Zoning Ordinances and Restrictions in Deeds*, 37 YALE L.J. 407, 415-16 (1928).

159. See MONCHOW, *supra* note 15, at 75; Van Hecke, *supra* note 158, at 416.

160. See Hansford, *supra* note 15, at 548.

161. See *id.*

162. See *Nahrstedt v. Lakeside Vill. Condo. Ass'n*, 878 P.2d 1275, 1288 (Cal. 1994) (refusing to grant, and discussing the undesirability of granting, "personal exemptions" to owners of restricted units).

163. *Id.*

signaling process.¹⁶⁴ The signals sent by developers or homebuyers when they sell or purchase a deed-restricted property might lose their force if case-by-case exceptions to covenant commitments were permitted. This, in turn, could erode the signaling function of covenants and so prove more offensive to their nature and ultimate purpose than the granting of variances would be to a zoning ordinance.

Second, although the Beaver Hills covenants did not stipulate any restrictions on the race of homeowners in the community, the conclusions derived from Beaver Hills may still be relevant to the longstanding debate over the effects of racially restrictive covenants. The Supreme Court declared racially restrictive covenants unenforceable in *Shelley v. Kraemer* in 1948.¹⁶⁵ However, covenants “not explicitly based on race” were used to maintain racial segregation long after that date.¹⁶⁶ There is also evidence that property owners continued to draft racially restrictive covenants after *Shelley*, and it has been proposed that racially restrictive covenants retained the power to influence behavior despite being legally unenforceable.¹⁶⁷

The story of Beaver Hills sheds some light on the puzzle of why this might be the case: the point of these restrictions was not to bind future owners legally but to constitute signaling behavior by the seller and to demand similar signaling behavior from buyers. The fact that these restrictions were not legally enforceable may even have strengthened their signaling power. A perception of extralegality, and the risks involved in abiding by a commitment for the sake of one’s neighbors without the right to force those neighbors to do the same, would make the purchase of a house burdened by these restrictions costly and thus inspire all the more faith in a party willing to make such a purchase. Parties with more sinister goals than those harbored by the Company—such as the maintenance of residential racial segregation—could very well succeed in those goals despite even less support from legal authorities than the Company could have expected to receive. In other words, the specific nature of *Shelley*’s attack on racially restrictive covenants—that these covenants were

¹⁶⁴ The question of whether restricted communities serve communitarian goals is itself the subject of a heated debate. See, e.g., Gregory S. Alexander, *Dilemmas of Group Autonomy: Residential Associations and Community*, 75 CORNELL L. REV. 1 (1990).

¹⁶⁵ 334 U.S. 1 (1948).

¹⁶⁶ MCKENZIE, *supra* note 31, at 76.

¹⁶⁷ See Brooks, *supra* note 96, at 12–13, 33–36; see also CLEMENT E. VOSE, CAUCASIANS ONLY: THE SUPREME COURT, THE NAACP, AND THE RESTRICTIVE COVENANT CASES 225 (1959) (describing the Federal Housing Administration’s role in encouraging the use of racially restrictive covenants even after *Shelley* declared them unenforceable).

unenforceable in courts, but *not* that parties were forbidden from signing such covenants at all¹⁶⁸—might have rendered that holding incomplete.

Much has changed since Beaver Hills was developed. There is no longer a mismatch between the prevailing law of covenants and what community builders like the Company were trying to accomplish. However, given the frequency and sometimes the glibness with which scholars integrate assumptions about restrictive covenants into broad land use policy arguments, there remain important lessons to be drawn from Beaver Hills. Somewhat ironically, the generally upbeat tone of the history of Beaver Hills suggests that the most important of these lessons may be that covenants are a dangerous tool from a policy perspective. Covenants that preceded zoning, like those used in Beaver Hills, were capable of doing what formal law could not or would not do. That capability is a major strength of covenants, and it is what allowed the Beaver Hills Company to build a physically idyllic neighborhood. From a policy perspective, however, it is tightly related to what may also be the greatest weakness of covenants: their potential ability to do what lawmakers have decided—perhaps with good reason—that formal law cannot or will not do.

168. See 334 U.S. at 13, 19-21.

